

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUIS ZELEDON, *individually and on behalf of all
other persons similarly situated,*

Plaintiffs,

-against-

DIMI GYRO LLC, *d/b/a "Chirping Chicken," et al.,
jointly and severally,*

Defendants.

15cv7301 (TPG) (DF)

**REPORT AND
RECOMMENDATION**

TO THE HONORABLE THOMAS P. GRIESA, U.S.D.J.:

This Court having ordered opt-in plaintiff Manuel Pereda ("Pereda") to show cause by November 18, 2017, why this Court should not recommend that Pereda's Fair Labor Standards Act ("FLSA") claims against Defendants be dismissed, pursuant to Rule 37(b) and (d) of the Federal Rules of Civil Procedure, for failure to comply with a Court Order and for failing to attend his own deposition (*see* Order To Show Cause, dated Oct. 25, 2017 (Dkt. 52)); and Pereda having made no submission to the Court in response to the Court's Order To Show Cause, despite more than two weeks having passed since the stated deadline; I respectfully recommend, for these reasons and the reasons stated in the Court's October 25, 2017 Order To Show Cause (a copy of which is attached hereto for reference), that Pereda's FLSA claims in this action be dismissed without prejudice.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, Pereda shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Honorable Thomas P. Griesa, at the United States Courthouse, 500 Pearl Street, Room 1630, New York, New York 10007, and to the chambers of the undersigned, at the United

States Courthouse, 500 Pearl Street, Room 1660, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Griesa. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988); *McCarthy v. Manson*, 714 F.2d 234, 237-38 (2d Cir. 1983).

Plaintiffs' counsel is directed to make best efforts to ensure that Pereda timely receives a copy of this Report and Recommendation, and that, if necessary, it is translated for him into Spanish.

Dated: New York, New York
December 5, 2017

Respectfully submitted


DEBRA FREEMAN
United States Magistrate Judge

Copies to:

All counsel (via ECF)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

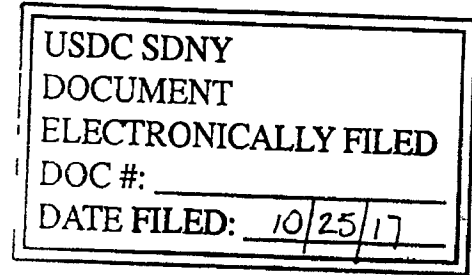
LUIS ZELEDON, *individually and on behalf of all
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DIMI GYRO LLC, *d/b/a "Chirping Chicken," et al.,
jointly and severally,*

Defendants.



15cv7301 (TPG) (DF)

ORDER TO SHOW CAUSE

DEBRA FREEMAN, United States Magistrate Judge:

This Fair Labor Standards Act ("FLSA") case has been referred to this Court by the Honorable Thomas P. Griesa, for general pretrial supervision. After having been informed by both counsel that they had been unable to secure the cooperation of opt-in plaintiff Manuel Pereda ("Pereda") to appear for a deposition, this Court issued an Order on September 14, 2017, directing Pereda to appear to give deposition testimony in this case on October 4, 2017. (*See* Dkt. 50.) This Court also directed Plaintiffs' counsel to make best efforts to ensure that Pereda timely received a copy of this Court's Order and that, if necessary, the Order was translated for him into Spanish. (*See id.*) Further, this Court expressly cautioned Pereda that, if he failed to appear for his deposition as directed by this Court, "then his claims against Defendants in this case may be dismissed for failure to comply with this Court's Order and for failure to cooperate in the pre-trial discovery process." (*Id.* (emphasis omitted).)

Now before this Court is a letter dated October 5, 2017, from Defendants' counsel (Dkt. 51), informing this Court that, despite its September 14 Order, Pereda failed to appear on October 4 for the scheduled deposition, and requesting that, as a result, Pereda's claims be dismissed for his failure to cooperate in discovery. To date, Pereda has not responded to

Defendants' request for the dismissal of his claims, nor has Plaintiffs' counsel submitted any opposition to Defendants' request.

Under the circumstances, it is hereby ORDERED that opt-in plaintiff Pereda show cause, in writing, no later than November 18, 2017, why this Court should not recommend to Judge Griesa that Pereda's FLSA claims against Defendants be dismissed, pursuant to Rule 37(b) and (d) of the Federal Rules of Civil Procedure, for failure to comply with a Court Order and for failing to attend his own deposition. Pereda's response to this Order should provide a specific explanation of any circumstances that affected his ability to appear at his deposition as directed, and should also state whether he wishes to proceed with his claim in this case and is prepared to do so by participating in the pre-trial discovery process. Pereda's response should be directed to the Court's *Pro Se* Office.

If Plaintiff does not respond to this Order, in writing, by November 18, 2017, then this Court will recommend that his case be dismissed without prejudice.

Plaintiffs' counsel is directed to make best efforts to ensure that Pereda timely receives a copy of this Order To Show Cause, and that, if necessary, it is translated for him into Spanish.

Dated: New York, New York
October 25, 2017

SO ORDERED



DEBRA FREEMAN
United States Magistrate Judge

Copies to:

All counsel (via ECF)